

STATE OF MICHIGAN  
COURT OF APPEALS

---

KYLE and LISA CAMARDA, JAMES and  
JANICE FRY, TODD and DIANE PELTIER,  
DONNAMARIE RUGGIANO, JANICE  
SCHWARTZ, and ELIZABETH  
VANDEVENTER,

UNPUBLISHED  
November 7, 2006

Plaintiffs-Appellees,

v

CITY OF EATON RAPIDS, a Michigan  
Municipal Corporation,

No. 269046  
Eaton Circuit Court  
LC No. 2005-223-NZ

Defendant-Appellant.

---

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right a trial court order denying their summary disposition motion. Because sufficient evidence was presented to raise a material question of fact as to the substantial proximate cause of the sewer event at issue, we affirm.

Plaintiffs brought this action against defendant when, due to an alleged defect in the sanitary sewer system, they suffered flooding of and resulting damage to their homes. Plaintiffs alleged defendant owned or operated the sanitary sewer system and had the legal authority to repair, correct or remedy defects in the system so was thus responsible for this sewage disposal system event pursuant to MCL 691.1416, *et seq.* Plaintiffs further alleged that the overflow of the sewer constituted an unconstitutional taking of plaintiffs' property.<sup>1</sup> Defendants asserted that the sanitary sewer problem was caused by an "act of God" and thus denied liability. Defendant thereafter moved for summary disposition based upon governmental immunity. The trial court denied defendant's motion, finding sufficient questions of fact existed as to whether a defect in the system caused the sewer backup.

---

<sup>1</sup> This count was dismissed by stipulation of the parties.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). MCR 2.116(C)(7) permits summary disposition where the claim is barred because of any one of several occurrences, including release, payment, or immunity granted by law. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.* Questions of statutory interpretation are questions of law this Court also reviews de novo. *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 665; 649 NW2d 760 (2002).

On appeal, defendant asserts it was entitled to summary disposition on the basis of governmental immunity because plaintiffs failed to offer admissible evidence sufficient to create an issue of fact as to the substantial and proximate cause of the sewer event. Specifically, defendant claims plaintiffs have provided no admissible evidence to contradict its assertion that an "act of God" rather than a defect was the substantial proximate cause of the sewer backup.

Pursuant to MCL 691.1417(2), "[a] governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency." A sewage disposal system event means the overflow or backup of a sewage disposal system onto real property. MCL 691.1416(k).

To avoid governmental immunity in a sewage disposal system event a claimant must show that all of the following existed at the time of the event:

- (a) The governmental agency was an appropriate governmental agency.
- (b) The sewage disposal system had a defect.
- (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
- (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
- (e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

See, *Willett v Charter Twp of Waterford*, 271 Mich App 38; 718 NW2d 386 (2006).

The primary issue here concerns element (e), above. "Defect" is defined at MCL 691.1416(e) as a "construction, design, maintenance, operation, or repair defect." "Substantial proximate cause" means a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury. MCL 691.1416(l).

In the context of a negligence action, the Michigan Supreme Court has adopted a definition of “act of God” to mean: “(T)hose events and accidents which proceed from natural causes and cannot be anticipated and provided against, such as unprecedented storms, or freshets, lightning, earthquakes, etc.” *Golden & Boter Transfer Co v Brown & Sehler Co*, 209 Mich 503, 510; 177 NW 202 (1920). This Court in *Potter v Battle Creek Gas Co*, 29 Mich App 71, 75; 185 NW2d 37 (1970), added the following comments about the “act of God” defense: “The definition of an ‘act of God’ requires an unusual, extraordinary, and unexpected manifestation of the forces of nature, and require(s) the entire exclusion of human agency from the cause of the injury or loss.”

Here, defendant presented evidence to the trial court that in the days preceding and following the sewer backup at issue (approximately May 21, 2004), the city of Eaton Rapids saw a significant amount of rainfall. In fact, evidence indicated that the rainfall was of such a magnitude as to be one of the most unusual amounts of May precipitation in Eaton Rapids’ reporting history. It was indicated that while the wastewater treatment plant was able to handle the day-to-day water/waste, the highly unusual amount of rainfall that saturated the ground resulted in large amounts of storm water infiltration and inflow to the sanitary sewer system and essentially overwhelmed it.

Defendants also presented evidence that lightening caused a power outage at the wastewater treatment plant and also affected the generator that would otherwise power the plant. As a result, nothing was able to move through the wastewater treatment plant for a period of time. Defendant’s expert(s) indicated that the power was out throughout the city and that residents’ sump pumps were unable to pump water from the homes during that same time period. According to defendant’s experts, when power was restored and the sump pumps again became operable, the wastewater treatment plant was inundated with a significant amount of water from the pumps, which also contributed to the backup.

Evidence was also presented, however, that defendant was previously made aware of problems with the sewer system. In a February, 2004 letter, a consulting firm purportedly hired by the city of Eaton Rapids noted defects that were found in the sewer system, including excessive infiltration. Additionally, the superintendent for the city of Eaton Rapids testified that some areas of the city have substandard storm sewers. He also testified that when he was hired in 2000, he was informed that the sewer system would not handle a heavy rain event and that such an event could cause sewer backups. The superintendent further testified that he was told the system was old and that there were areas of inflow or infiltration due to cracks in the pipes, misaligned joints, and broken or leaking sewer laterals. He also testified they’d had significant rain events in the past where the same situation occurred.

With respect to the power outage, the superintendent testified that sewer backups had occurred on May 21, 2004 prior to the power outage. In addition, a wastewater treatment plant employee testified that when the power went out, a generator at the plant automatically took over. The employee testified that he and the employees of the plant thought that power had been restored, so they manually turned the generator off a few minutes after the power had gone out.

When it was discovered that power had not been restored, the employees were unable to restart the generator. Power thereafter remained out at the plant for over an hour, during which time the employees were still unable to utilize the generator.<sup>2</sup>

Notably, the exception to government immunity applies if a defect was *a* substantial proximate cause of the event and the property damage or physical injury. Again, a substantial proximate cause in this context is a proximate cause that was 50% or more of the cause of the event. Given the evidence suggesting a known lack of capacity in the existing sewer system and wastewater treatment plant employees turning off the generator before power was restored, reasonable minds could differ as to whether a defect existed and, if so, whether it was 50% or more of the cause of the sewer event. Because the substantial proximate cause of the sewer event remains at issue, the trial court did not err in denying defendant's motion for summary disposition.

Affirmed.

/s/ David H. Sawyer  
/s/ Kurtis T. Wilder  
/s/ Deborah A. Servitto

---

<sup>2</sup> Defendant advances an argument concerning the admissibility of an expert report cited to and relied upon by plaintiffs. The Court need not address the admissibility of the report, however, there being sufficient other evidence submitted by plaintiffs as to the substantial proximate cause of the sewer event.